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SCHOOL HEALTH

& SCHOOL NURSE SERVICES:

ISSUES INVOLVING THE MEDICALLY

FRAGILE STUDENT

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SCHOOL HEALTH AND SCHOOL NURSE SERVICES: ISSUES INVOLVING THE MEDICALLY FRAGILE STUDENT

A. SCHOOL HEALTH AND SCHOOL NURSE SERVICES AS RELATED SERVICES

1. Relevant Definitions

a. Under the IDEA, "related services" are an array of supportive services provided to children with disabilities to assist them in benefitting from special education. 34 C.F.R. § 300.34.

b. By definition, "related services" means "transportation and such developmental, corrective, and other support services required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include **school health services and school nurse services**, social work services in schools, and parent counseling and training." 34 C.F.R. § 300.34(a).

c. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person. 34 C.F.R. § 300.34(c)(13).

d. Generally, special education students who have an acute or chronic medical condition that requires monitoring or care from a school nurse or other qualified person are likely to have school health services on their IEP as a related service. **Note**: An exception exists regarding surgically implanted devices. *See* Section D below.

2. The Individualized Education Program ("IEP") Committee

a. Role of the IEP Committee

i. The IEP committee is instrumental in making individualized assessments regarding related services—including the provision of health services, nurse services, and medical services for diagnostic purposes—as required by the regulations to the IDEA. The IEP committee is also instrumental in ensuring that the IEP contains the requirements outlined in the regulations regarding related services and does not violate the IDEA.

ii. Each student's need for related services, like the need for special education, is determined on an individual basis as part of the IEP process. *See Letter to Rainforth*, 17 IDELR 222 (OSEP 1990). The list of related services in 34 C.F.R. § 300.34 is illustrative, not exhaustive. It provides examples of services that may be required to assist a child with a disability to benefit from special education. However, services not mentioned in the list may qualify as related services if they are necessary for a child to benefit from special education.

iii. The IEP must contain a statement of the "anticipated frequency, location, and duration" of related services that will be provided. 34 C.F.R. § 300.320(a)(7).

iv. The IEP must contain a statement of the specific education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:

1. to advance appropriately toward attaining the annual goals;

2. to be involved in and make progress in the general education curriculum in accordance with 34 C.F.R. § 300.320(a)(1), and to participate in extracurricular and other nonacademic activities; and

3. to be educated and participate with other children with disabilities and nondisabled children in the activities described in this section. 34 C.F.R. § 300.320(a)(4).

v. The Department of Education provided the following clarifying statement: "This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in the denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP team based on the child's individual needs." *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46665 (2006).

vi. Any guidelines or policies that categorically deny related services to students with disabilities violate the IDEA.

b. *Considerations for the IEP Committee*

i. The IEP Committee must determine if a student requires school health services and school nurse services as related services to benefit from his or her special education placement. If the Committee decides that school nurse services are necessary, the Committee must add them to the IEP and develop appropriate goals.

ii. In making this assessment, the IEP Committee should obtain the answers to the following questions:

1. Whether the student has a medical condition that requires school health services and school nurse services to benefit from his/her special education program?

2. What specific school health services, provided by a nurse or other qualified person, does the student require to benefit from his/her education?

3. What will be the frequency and duration of school health services?

4. Who will provide the school health services?

c. *Members of the IEP Committee*

i. The IDEA does not expressly require that related service providers be members of a child's IEP team, except when the service provider qualifies as the child's special education teacher. 34 C.F.R. § 300.321(a)(3).

ii. However, "at the discretion of the parent or the agency," the IEP team can include "other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate." 34 C.F.R. § 300.321(a)(6). The Department of Education has suggested that it would be appropriate for a related service provider to be included, if a particular related service is to be discussed as part of the IEP meeting. *Notice of Interpretation, Appendix A to Part 300, Question 3* (1999 Regulations).

iii. Parents are "equal" participants as team members in the IEP process. However, they do not have veto power over any of its components, including related services. It is an incorrect interpretation of the IDEA that the parents have an equal vote in

formulating the student's IEP. *Buser v. Corpus Christi Indep. Sch. Dist.*, (S.D. Tex. 1994), *aff'd* 51 F.3d 490 (5th Cir. 1995).

d. *Parent Demands for Specific School Health and School Nurse Service Providers*: Case law applying the IDEA is clear that a school district has the "sole discretion" with respect to the personnel assigned to serve a special education student, as long as the student is receiving FAPE. Courts have reached this decision even in the face of parental requests and mandates regarding personnel that are contrary to the decisions of school districts. Moreover, parental notice and consent regarding such personnel decisions are not required, thus an IEP meeting is not necessary in order to begin implementation of such personnel assignments.

i. In *Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp.2d 880 (Dist. Minn. 2003), the school district acquiesced to a parental request for a particular aide, or personal care assistant ("PCA"), for the student and had written into the IEP document that the parents would provide the student's aide. Eventually, the school district replaced the PCA with a district employee. This led the parents to file a due process complaint, claiming the district had violated the IDEA by failing to provide services in conformity with the IEP which, they contended, gave them the right to select the PCA. 259 F. Supp. 2d at 883. However, the Court rejected the claim, and emphasized that so long as the services in the IEP are being provided, the IDEA does not afford parents the right to determine who will provide the services. *Id.* at 889. "We have found no case, and the Plaintiffs have drawn none to our attention, which granted sole discretion to a parent to select a specific individual to provide the generic-like services of a PCA." *Id.* Thus, the Court found that the failure to provide a particular aide was not a denial of FAPE, even if the aide the parents preferred was better than the one supplied by the district, more knowledgeable about the student, or better trained to provide services. *Id.* at 885. *See also, Los Altos Elementary School District* (Cal. SEA SN 02-01950), 103 LRP 810 (2002), at 10 (parents have no right to veto power over the district's choice of an aide). Ultimately, the Court decided that while parental preference is significant, it alone cannot be the basis for compelling a school district to provide a particular educational plan nor can it usurp the District's role in selecting its staff to carry out the IEP's provisions. *See id.* (citing *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. Me. 1993); *Illinois State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988)).

ii. *Zasslow v. Menlo Park City Sch. Dist.*, 60 Fed. Appx. 27 (9th Cir. 2003): Here, the parents of a special education student demanded

that the school use a particular private speech therapist. Relying on the decision in *Slama*, the Court determined that a district need not allow the parents' preferred private or home care service provider to provide services on behalf of the district, even if the parents request such. *See also Gellerman v. Calaveras Unified Sch. Dist.*, 43 Fed. Appx. 28 (9th Cir. 2002) (holding for district in case in whereby parents claimed that only an aide who had had experience with their son could appropriately serve him).

iii. *Monterey Peninsula Sch. Dist.*, 38 IDELR 223 (CA SEA 2003): The Hearing Examiner considered the demands of a mother that she be permitted to provide services to her special needs child while at school because the mother was a nurse. The Hearing Examiner denied this request, held for the school district, and allowed the district's nurse to continue as the child's care provider in school. The Hearing Examiner, citing *Board of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), stated "It is well established that, as long as a school district provides an appropriate education, methodology, including the selection of school personnel, is left to the school's discretion. [cite omitted]. An order providing mother with 'veto power' over District personnel decisions is contrary to the mandate of *Rowley*." *Id.* at 896.

iv. Similarly, in *Indep. Sch. Dist. No. 728*, 30 IDELR 461 (MN 1999), the Hearing Examiner held that the school district had the authority to replace a nurse provided by a private nursing agency which was owned by the parent of the student receiving nursing services with a school district nurse. *See also Bd. of Educ. of Scotia-Glenville Central Sch. Dist.*, 23 IDELR 727 (NY SEA 1995) (district prevailed when parents challenged district's refusal to allow her to serve as child's aide at school).

v. In *Tuscaloosa Co. Bd. of Educ.* (Ala. SEA) 21 IDELR 826, 21 LRP 2923 (1994), the Hearing Examiner reflected that the IDEA requires "prior written notice" of proposed changes to "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." *Id.* (citing 20 U.S.C. § 1415(b)(3)). The Hearing Examiner determined that since a change in staff is not a significant or substantial change in program or a change in placement, the school district was "under no obligation to even inform the parents." *Id.; See also DeLeon v. Susquehanna Comm. Sch. Dist.*, 747 F.2d 149, 153-54 (3rd Cir. 1984) (change in method of transporting student was not a change in placement requiring a hearing before

implementation; "[t]he touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience'... In some areas it may be possible to draw bright lines: for instance, replacing one teacher or aide with another should not require a hearing before the change is made").

B. MEDICAL SERVICES AS RELATED SERVICES

1. Medical Services for Diagnostic Purposes v. Excluded Related Services

a. Medical services that are covered related services are limited to "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. § 300.34(c)(4).

b. The Department of Education added the following guidance in the 2006 IDEA Part B regulations: "Each public agency is responsible for providing services necessary to maintain the health and safety of a child while the child is in school, with breathing, nutrition, and other bodily functions (e.g., nursing service, suctioning a tracheotomy, urinary catheterization) if these services can be provided by someone who has been trained to provide the service and are not the type of services that can only be provided by a licensed physician. (*Cedar Rapids Community Sch. Dist. v. Garret F.*, 29 IDELR 966 (U.S. 1999)." *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46571 (2006).

c. *Bright-Line Rule*

i. The Court in *Irving Independent School District v. Tatro*, 468 U.S. 883 (U.S. 1984) established a bright-line rule for distinguishing between health care-related supportive services (those which can be administered by a person other than a physician) and excluded medical services (those that can only be delivered by a physician). According to the Court, school districts are not required to provide therapeutic services personally performed by a physician.

ii. The Supreme Court's decision in *Tatro* was affirmed in *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (U.S. 1999). The decision in *Cedar Rapids* rejected the "multifactor" view, a competing approach previously used by courts to evaluate whether required health services were supportive services or excluded medical services, in favor of the bright-line rule. The "multifactor" view took into account whether the care was required on a continuous or intermittent basis, whether existing school health personnel could perform the services or if additional

personnel needed to be hired, whether the cost of the service was significant, and if the failure to perform the service properly could have severe, even fatal, consequences. *Tatro*, 468 U.S. 883, *affirmed* in *Cedar Rapids*, 526 U.S. 66 (U.S. 1999).

d. Because medical services that are covered related services are limited to "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services," medical services are required under the IDEA to the extent that they are necessary for diagnostic purposes. The services of licensed physicians for other purposes, specifically for treatment are, by implication, not related services. *See Laughlin III v. Central Bucks Sch. Dist.*, 1994 WL 8114 (E.D. Pa. 1994).

2. Examples of Excluded Medical Services and Medical Services for Diagnostic Purposes

a. In *Mary Courtney T. v. Sch. Dist. of Phil.* (3d Cir. 2009), the Third Circuit ruled that a Pennsylvania district did not have to pay for a teenager's placement in a psychiatric residential facility. Noting that the program was more akin to a hospital than a school or a residential educational facility, the court held that the student's placement was an excluded medical service.

b. The provision of vision therapy is likely to be the school district's responsibility, if needed to assist with the child's educational needs or performance and if it does not require administration by a physician. Whether the required nexus exists between the therapy and the child's educational needs is a fact-sensitive decision that must be made on an individual basis.

i. *Dekalb County Sch. Dist. v. M.T.V. by C.E.V. and C.T.V.*, 446 F.3d 1153 (11th Cir. 2006): Here, the Eleventh Circuit ruled that a school district's IEP for a student with a visual condition, which had not manifested itself in poor educational performance, prevented the student from receiving FAPE. The Court upheld an order to the district to pay for the student's vision therapy services. The evidence showed the student's significant visual problems would become much worse and interfere significantly with his ability to benefit from special education without therapy. Therefore, the District was required to provide vision therapy in order to offer the student FAPE.

ii. However, in *Eugene Sch. Dist. 4J*, 35 IDELR 52 (SEA OR 2001), a 15-year-old student with ED did not require vision therapy to benefit from his education. Therefore, the district was not

obligated to provide such therapy as a related service. This student's above-average performance in reading comprehension undermined the parent's contention that he required vision therapy.

3. Medical Services on a School Bus

a. *Obligation to Provide Medical Services*

i. In light of the bright-line rule adopted in *Cedar Rapids*, schools must administer medical procedures to students with disabilities both in the classroom and on the school bus, if these treatments can be administered by a person other than a physician. *Skelly v. Brookfield LaGrange Park Sch. Dist.*, 968 F. Supp. 385 (N.D. Ill. 1997); *Farmers Ins. Exchange v. S. Lyon Comm. Sch.*, 237 Mich. App. 235 (Mich. Ct. App. 1999). Basically, the medical procedures schools are obligated to provide during the course of the school day are also required while in transit.

ii. It may be permissible not to attempt to deliver medical services on a school bus if the student's medical needs are of a non-emergency nature and can wait to be addressed once at school.

iii. The provision of medical services on a school bus may be dependant upon the proper storage of medication and medical equipment on the bus. School districts should consider the procedures for ensuring that medication is stored at the proper temperature and that medical equipment is secured so that it is not damaged during transit.

b. *Medical Procedures Administered by Bus Drivers*

i. In *Forest Area Comm. Sch.*, 47 IDELR 117 (SEA MI 2006), a school district complied with the IDEA when it developed an IEP that called for an elementary student's bus driver to administer an injection if the student suffered an epileptic seizure on the bus. Despite the parents' assertion that an aide was necessary for travel, the ALJ determined that the driver could adequately treat the child in an emergency. The parents could not convince the ALJ that the driver could not make an emergency stop and administer the medication within one minute.

ii. While bus drivers may occasionally have to attend to the emergency medical needs of students, schools should consider the severity of a student's medical needs and the extent to which assigning a bus driver to address those needs will divert his attention and place passengers in peril. *See, e.g., Clark Sch. Dist.*,

20 IDELR 468 (SEA SD 1993); *Chester Sch. Dist.*, 23 IDELR 588 (SEA NH 1995).

4. Medically Fragile Students

a. *General Information*

i. "Medically fragile" generally means a student requiring intensive and prolonged health care as a result of a catastrophic medical event or congenital condition. The term can also refer to someone having extreme medical needs that require specific procedures to be provided or available during the day in order for the student to attend school.

ii. The Supreme Court has held that school districts must provide health care-related services to a medically fragile student if the services are supportive services the child needs to receive during the day to attend school and benefit from her education. Further, districts must provide such services that can be performed by nonphysicians. These types of services are considered to be covered related services. *Tatro*, 468 U.S. 883.

iii. In order to meet the needs of a medically fragile child, districts may seek an independent medical reevaluation of the student in order to resolve conflicting and incomplete information about the student's condition. *See Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir. 2006).

b. *Medically Fragile Students and Least Restrictive Environment ("LRE")*

i. Medically fragile students have the same rights to LRE as any other student with a disability. However, the right to LRE can be curtailed if doing so furthers the best interests of the student's health and welfare.

ii. The medical condition of some students is so severe that they cannot be transported without it posing a serious risk to their personal health and safety. These medically fragile students may reside at hospitals and other medical facilities while others may be able to stay at home. *Abney v. Dist. of Columbia*, 849 F.2d 1491 (D.C. Cir. 1988); *Letter to Rowland*, 16 IDELR 501 (OSERS 1990).

iii. Schools must consider whether the educational program should be brought to the bedside of such students and whether the medical equipment upon which such students rely can be safely

transported. For medically fragile students, the inclusion analysis extends beyond a determination of the proper educational placement to encompass the location where the medical procedures will be administered. Student safety can never be jeopardized simply to achieve technical compliance with the LRE requirement. *See, e.g., Hawaii Dept. of Educ. v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983); *Galena Park Indep. Sch. Dist.*, 507 IDELR 409 (SEA TX 1985).

c. *Do Not Resuscitate Orders (DNR's)*

i. As more children with severe disabilities and health conditions are enrolled in schools, school personnel will increasingly be faced with out-of-hospital DNR orders. In Texas, details relating to these documents are found at TEX. HEALTH & SAFETY CODE § 166.001, *et seq*. Most states have separate statutes in place for DNR orders.

ii. A DNR order generally directs responding health care professionals not to use CPR, advanced airway management, artificial ventilation, defibrillation, or transcutaneous cardiac pacing.

iii. A declarant may revoke an out-of-hospital DNR at any time without regard to the declarant's mental state or competency. *See* TEX. HEALTH & SAFETY CODE § 166.092.

iv. An out-of-hospital DNR order is an official legal document which must fulfill certain standards, including a witnessing requirement. In Texas, generally, forms supplied by the Texas Department of Health are utilized. A simple written note from parents will not suffice to serve as a DNR order under any state law.

v. Policy questions remain persistent despite the existence of DNR orders in the schools for many years. The litigation involving DNRs and minors has not addressed the issues relating to students who have IEPs. The authority that parents have in making decisions about DNRs in hospital settings is blunted and defused in school settings where parents are only one part of the decision-making process for students. Would public school districts be expected to oppose parent judicial requests for a DNR and, if the parents are successful, would that DNR simply be superimposed on a student's IEP? If an IEP team opposes a parent's DNR and refuses to include it in an IEP (assuming that such discretion is permissible), would the school be required to reimburse the parent for their cost of placing the child in a medical facility that will

adhere to the DNR? In the absence of a congressional amendment to the IDEA that expressly authorizes the DNR as part of the special education process, should the IDEA's purpose in including children with special needs in the regular academic setting be viewed as antithetical to the design and implementation of a DNR order?

C. ADMINISTRATION OF MEDICATION

1. Legal Obligations

a. School districts have no obligation to provide (supply) medication as it is neither special education nor a related service. Parents are responsible for supplying medicine their child requires. *See Letter to Veir*, 20 IDELR 864 (OCR 1993).

b. Under the law, if a student must take medication during the school day, at the proper intervals, and in dosages in order to effectively participate in his educational program, administration of such medication may be required under IDEA or Section 504. *See* 34 C.F.R. § 104.33.

i. *Berlin Brothers Valley (PA) Sch. Dist.*, 353 IDELR 124 (OCR 1988): School districts cannot make administration of medication contingent upon the parents signing a consent form releasing the school district from liability in connection with medication administration.

ii. *Casey J. v. Derry Cooperative Sch. Dist.*, 17 IDELR 1095 (D.N.H. 1991): Although a school district could not condition receipt of special education and related services upon administration of Ritalin or condition placement decisions on an agreement to permit administration of Ritalin, the appropriate placement decision may vary depending on whether or not the student is taking the medication.

c. School personnel cannot require parents to obtain a prescription for medication as a condition of attending school, receiving an evaluation to determine if a child is eligible for special education services, or receiving special education and related services. 20 U.S.C. § 1412(a)(25)(A); 34 C.F.R. § 300.174(a).

d. However, school personnel may speak with parents or guardians regarding a child's academic and functional performance, behavior in the classroom or school, or the need for an evaluation to determine the need for special education or related services. 34 C.F.R. §300.174(b).

e. School districts have no right to compel parents to administer medication to their children because parents have a right under state and federal constitutional law to choose not to medicate their children. However, those constitutional rights might be abridged when failure to medicate or otherwise seek medical treatment jeopardizes the life of a child or endangers others. *Niewendorp v. American Family Home Ins. Co.*, 22 IDELR 551 (WI 1995).

i. *Evergreen Sch. Dist.*, 106 LRP 18815 (SEA WA 2006): The ALJ considered the parents' argument that the district "pressured" them to have their child on medication for his attention deficit disorder so that he could act appropriately at school. The school district was not held liable for a violation of the IDEA because the parents did not establish, by a preponderance of the evidence, that the district required the student to be on medication as a condition of attending school, receiving an evaluation, and/or receiving services.

ii. *S.J. by S.H.J. and J.J. v. Issaquah Sch. Dist. No. 411*, 48 IDELR 218 (W.D. Wash. 2007): Although the parents argued that the school district required the student to take medication as a condition of attendance, the Court found no violation of the IDEA, Section 504, or the ADA where the student lost no benefits or educational opportunities as a result of the medication requirement in his BIP, the child's parents agreed to the provision in the BIP, and the student was never removed from school or punished for failing to take his medication in accordance with the BIP.

2. Guidelines Regarding Administration of Medication

a. School districts may not adopt a general policy of refusing to administer medication to all students. The school district must administer during school hours medication that a placement team determines a student with a disability needs to benefit from his education program. *Pearl (MS) Pub. Sch. Dist.*, 17 IDELR 1004 (OCR 1991). If a student must take medication during the school day to effectively participate in his educational program, then administration of such medication may be a related service under the IDEA or Section 504. *Berlin Brothersvalley (PA) Sch. Dist.*, 353 IDELR 124 (OCR 1988); *Conejo Valley (CA) Unified Sch. Dist.*, 20 IDELR 1276 (OCR 1993); *San Ramon Valley (CA) Unified Sch. Dist.*, 18 IDELR 465 (OCR 1991); *Fairfield-Suisun (CA) Unified Sch. Dist.*, 353 IDELR 205 (OCR 1989).

b. School districts may refuse to administer medication to a student with a disability on the basis of a school district policy prohibiting administration of medication in excess of the physician's recommended daily dosage.

DeBord v. Board of Educ., of the Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1998); *Davis v. Francis Howell Sch. Dist.*, 25 IDELR 212 (8th Cir. 1997).

c. An ALJ has determined that he does not have jurisdiction over a parent's due process complaint alleging that the school district had no right to contact the child's treating physician and question whether the child's prescribed dosage was appropriate. According to the ALJ, the issue was one of medical treatment, not special education, thus it did not involve an IDEA claim. The ALJ indicated that the parents could file suit under Section 1983, Section 504, or the ADA. *John A ex rel. A. A. v. Board of Educ. for Howard Cnty.*, 929 A.2d 136 (Md. Ct. App. 2007).

3. Medication Administration and School Personnel: In *Collier County Sch. Dist.*, 110 LRP 7471 (SEA FL 09/15/2009), the Administrative Law Judge determined that a school district's refusal to hire a full-time nurse for a child with a seizure disorder was reasonable because the administration of the particular medication at issue did not require medical expertise. Therefore, the student's health plan which required the principal or assistant principal to administer the medication as needed was not a violation of the IDEA and was upheld.

4. Student Self-Medication: In *San Juan (CA) Unified Sch. Dist.*, 20 IDELR 549 (OCR 1993), OCR concluded that a school district denied a child FAPE when it relied on the ADHD student to present herself to take her medication. OCR concluded that given the student's long history with impulse problems and attention deficits, the district should not have made her responsible for going to get the medication on her own initiative.

5. Considerations for the IEP Committee

a. Administration of medication is a placement decision, whether or not a student with a disability covered under Section 504 requires special education or any other related services. *Letter to Mentik*, 19 IDELR 1127 (OCR 1993). Accordingly, districts should convene a meeting and otherwise comply with 34 C.F.R. § 104.35 and 104.36.

b. OCR has determined that the IEP committee should meet and discuss the following issues regarding administration of medication:

i. The purpose of the medication;

ii. Which individuals at the student's school have responsibility for administering the medicine;

iii. Whether any staff training for the administration of the medication is necessary;

iv. The protocol to be followed in the event of an emergency involving the student and his medication. *Culver City (CA) Unified School Dist.*, 16 IDELR 673 (OCR 1990); 34 C.F.R. § 104.35.

D. SURGICALLY IMPLANTED DEVICES AS A RELATED SERVICE

1. Surgically Implanted Devices Excluded as Related Service

a. The Regulations clearly state "related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g. mapping), maintenance of that device, or replacement of that device." 34 C.F.R. § 300.34(b)(1).

b. The Department of Education has stated that "[t]he exclusion of mapping from the definition of related services reflects the language in Senate Report (S. Rpt.) No. 108-185, p. 8, which states that the Senate committee did not intend that mapping a cochlear implant, or even the costs associated with mapping, such as transportation costs and insurance co-payments, be the responsibility of a school district. These services and costs are incidental to a particular course of treatment chosen by the child's parents to maximize the child's functioning, and are not necessary to ensure that the child is provided access to education, regardless of the child's disability, including maintaining health and safety while in school." *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46569-70 (2006).

2. Limits On the Exclusion

a. The Department of Education has said that the exclusion of mapping as a related service is not intended to deny a child with disability assistive technology, proper classroom acoustical modifications, educational support services, or routine checking to determine if the external components of a surgically implanted device is turned on and working.

b. Moreover, the U.S. Department of Education clarified in 34 C.F.R. § 300.34(b)(2) that nothing in 34 C.F.R. § 300.34(b)(1) (which excludes surgically implanted devices and mapping from the definition of related services) should be interpreted as a:

i. Limitation on the right of a child with a surgically implanted device to receive related services that are determined by the IEP team to be necessary for the child to receive FAPE.

ii. Limitation on the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain

the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school.

iii. Prevention of routine checking of an external component of a surgically implanted devices to make sure it is functioning properly, as required by 34 C.F.R. § 300.113(b).

3. Mapping v. Maintenance

a. The 2006 Part B regulations clarify that the maintenance and monitoring of surgically implanted devices that requires the expertise of a licensed physician or an individual with specialized technical expertise beyond that typically available to school district personnel is not a related service. *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46571 (2006).

b. The 2006 Part B regulations require routine checking of hearing aids and external components of surgically implanted devices as follows:

i. Each public agency must ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly. 34 C.F.R. § 300.113(a).

ii. Subject to 34 C.F.R. § 300.113(b)(2), each public agency must ensure that the external components of surgically implanted medical devices are functioning properly. 34 C.F.R. § 300.113(b)(1).

iii. For a child with a surgically implanted medical device who is receiving special education and related services under this part, a public agency is not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device). 34 C.F.R. § 300.113(b)(2).

c. The Department of Education explained that "[t]eachers and related service providers can be taught to first check the externally worn speech processor to make sure it is turned on, the volume and sensitivity settings are correct, and the cable is connected, in much the same manner as they are taught to make sure a hearing aid is properly functioning. To allow a child to sit in a classroom when the child's hearing aid or cochlear implant is not functioning is to effectively exclude the child from receiving an appropriate education. Therefore, we believe it is important to clarify that a public agency is responsible for the routine checking of the external components of a surgically implanted device in much the same manner as

a public agency is responsible for the proper functioning of hearing aids." *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46571 (2006).

E. PROVIDING HEALTH RELATED SERVICES TO STUDENTS WITH DISABILITIES UNDER SECTION 504 OF THE REHABILITATION ACT

1. General Standards

   a. Section 504 of the Rehabilitation Act of 1973 is a separate statute assuring non-discrimination against disabled students by all school districts that receive federal funds.

   b. Section 504 provides protections for students who have disabilities, but might not qualify for services under IDEA because their disabilities do not (or have not yet) had a negative effect on the student's educational performance, or because their disability fails to meet one of IDEA's specific categories. For example, many students with ADHD or dyslexia are often served under § 504 instead of IDEA.

   c. An individual is "disabled" for 504 purposes if he/she:

      i. has a physical or mental impairment which substantially limits his/her major life activities.

         1. "Major life activities" include: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, eating, sleeping, standing, lifting, bending, learning, reading, concentrating, thinking, communicating and working. A "major life activity" includes the operation of a major bodily function. Major bodily functions include functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

      ii. has a record of such an impairment; OR

      iii. is regarded as having such an impairment.

   d. ADA Amendments Act of 2008

      i. Congress enacted the ADA Amendments Act of 2008 and expanded the definition of "individual with a disability."

      ii. OCR published a revised Q&A document on March 27, 2009, that explains how the ADA Amendments Act affects eligibility

determinations under Section 504. Before the ADA Amendments took effect, OCR observed, districts were required to consider a student's use of mitigating measures when determining whether the student had a physical or mental impairment that substantially limited a major life activity. *See, e.g., Garcia v. Northside Indep. Sch. Dist.*, 47 IDELR 6 (W.D. Tex. 2007) (holding that a student with asthma did not have a disability under Section 504 because he could remediate his breathing problems by using an inhaler). Under the new law, however, districts cannot consider mitigating measures such as medication and hearing aids in determining whether a student has a disability under Section 504. (Note that ordinary eyeglasses and contact lenses do not qualify as "mitigating measures" under the ADA or Section 504.)

2. Related Aids and Services

a. For purposes of Section 504, the terminology used is "related aids and services." 34 C.F.R. § 104.33(b)(1). Therefore, health services that can be delivered by a school nurse or other appropriately trained personnel, such as administration of medication, may be a required related aid or service, if necessary for a student with a disability to effectively participate in her educational program.

b. Unlike the IDEA, Section 504 regulations do not list specific types of related services. Nonetheless, the Office of Civil Rights ("OCR") Letters of Finding demonstrate that the legal principles governing the identification of specific related services are substantially similar under both laws.

i. *Chattahoochee County (GA) Sch. Dist.*, 6 ECLPR 26 (OCR 2008): OCR explained that a school district had a duty to provide the related aids and services a child required to participate in noneducational programs, unless doing so would fundamentally alter the nature of the program or create an undue burden.

ii. *New York City (NY) Dep't of Educ.*, 49 IDELR 229 (OCR 2007): OCR determined that a student's right to transportation, like all other related services, needed to be decided by the student's 504 team.

iii. *Long Beach Unified Sch. Dist.*, 53 IDELR 58 (OCR 2009): OCR noted that Section 504 requires districts to "evaluate any student who, because of disability, needs or is believed to need special education or related aids and services before initially placing the student and before any subsequent significant change in placement.

c. In contrast to the IDEA, a student may receive related services under Section 504 even if he does not need special education.

3. Potential Issues

a. *Administration of Medication*

i. *Conejo Valley (CA) Unified Sch. Dist.*, 20 IDELR 1276 (OCR 1993): The school district in this matter had a policy that specified the categories of licensed medical paraprofessionals who were authorized to administer both routine and emergency injections. OCR determined that this was a denial of FAPE as it did not take into consideration the individual needs of the student. Here, the student suffered from Down Syndrome and diabetes; he could potentially fall into a coma if his insulin injections were not given immediately. Since the licensed personnel authorized to administer insulin in the student's IEP were not in the presence of the student on a regular basis or on the bus, this emergency response plan denied the student FAPE.

ii. *A.P. v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 538 F. Supp. 2d 1185 (D. Minn. 2008): The school district refused to assist a 5-year-old student with his glucagon injections, and the court determined that this decision was not clearly unreasonable in light of state law. The state law at issue discouraged laypersons from administering injections and the guidelines suggested that school nurses supervise the administration of all injections. Therefore, it was not plainly obvious that the parents' request that the staff be trained and willing to operate student's blood-glucose meter and insulin pump was reasonable.

iii. *Valle Lindo (CA) Elem. Sch. Dist.*, 47 IDELR 170 (OCR 2006): A school district's failure to provide personnel to administer the child's insulin injections was not a violation of Section 504 or the ADA where OCR determined that there was a miscommunication between the parent and the district. The parent administered all of the child's injections during the school year and claimed that the district required her to do so. The district, on the other hand, believed that the parent wanted to administer the shots herself. OCR reviewed the child's Section 504 plan which stated that the parent would administer the injections until the district could properly train its staff to do so. Accordingly, OCR determined that the district's lapse in care did not result from a lack of training or an unwillingness to provide medical care, but a miscommunication with the parent about when parental administration would end and school district administration of the injection would begin.

F. FOOD ALLERGIES (INCLUDING PEANUT ALLERGIES)

1. Compliance with Federal Law

a. **The standard for a child with life-threatening food allergies**:

In order to provide students with a free appropriate public education (FAPE) as required by Section 504 and Title II of the Americans with Disabilities Act (ADA), "each student's plan must be based on an individualized consideration of the student's needs." *Saluda (SC) School District One*, 47 IDELR 22 (OCR 2006). The focus of these civil rights statutes is a student's access to educational programs, and the standard for access for a student with life-threatening food allergies: "As the vast majority of District students without disabilities do not face a significant possibility of experiencing serious and life-threatening reactions to their environment while they attend District schools, Section 504 and Title II require that the District provide the Student with an environment in which he also does not face such a significant possibility." *Id.* In other words, it is incumbent on the District to discern, with the help of the input of the 504 team, how the Student's environment may be modified so that it is not life-threatening.

b. **Requirements of District Documents, including 504 and Emergency Plans.**

The student in the OCR case referenced above had both a 504 Plan and an Emergency Plan; OCR ultimately found that the information contained in that district's plans were insufficient. OCR specifically listed what thorough District or School documents should contain:

i. Adequate policies, procedures and/or protocols governing PTA (Peanut Treenut Allergy) risk management in each type of School program and activity, including classrooms and common use rooms (e.g. the cafeteria, library, computer labs, gymnasium, and art and music rooms), and during recess periods, bus transportation, field trips, and extracurricular, School-sponsored activities.

ii. Sufficient emergency response policies, procedures and/or protocols covering all School programs and activities to address instances in which the Student is suspected of having a PTA-related reaction. These procedures should address the proper handling and administration of epinephrine in the event of anaphylactic or other serious allergy-related reaction, and will identify the staff responsible for emergency responses.

iii. A provision that all District staff responsible for the immediate custodial supervision or care of the Student (including substitutes) will receive comprehensive training on PTAs and the implementation of the Student's Plan. The Plan should establish when, how often, for how long, and by whom the training is conducted, as well as the content of this training.

iv. A provision requiring that at least one fully PTA-trained staff person be at the School during all regular school hours and at all School-related activities attended by the Student who can administer epinephrine consistent with the District's PTA-related policies, etc.

v. Provisions setting out all of the PTA-related responsibilities of parents and students in all School programs and activities and an effective process for communicating their PTA-related responsibilities to them, and what sanctions are applicable to individuals who harass students with peanut allergies because of those allergies.

Id.

Any Plan that complies with 1-5, above, and is implemented as written should provide a student FAPE under Section 504.

c. **Requirements of Training**

OCR also went on to specify that training for District staff should include "topics such as the following:"

i. Recognizing the symptoms of a PTA emergency;

ii. Common causes of PTA emergencies;

iii. Understanding and properly implementing Food Allergy Plans;

iv. The contents of the Food Allergy Plans of the students with PTAs for whom each District staff person has immediate custodial or care responsibilities;

v. Properly and safely handling, administering and storing antihistamines and epinephrine; and

vi. **Detailed instruction on District PTA policy, procedures, protocols, and practices.**

Id.

d. **The importance of procedural safeguards**

A District must follow adequate procedures to evaluate whether a student needs a peanut-free lunchroom or school as a related service for his disability and cannot simply reject this accommodation out of hand. *Plumas (CA) Unified Sch. Dist.*, 55 IDELR 265 (OCR 2010). A District may still determine, based on appropriate evaluation, that a student does not need a peanut-free lunchroom or school, but then the Student's parents must be provided adequate notice of procedural safeguards following that decision. In one OCR opinion, the 504 team's evaluation included consultation with the school nurse, the nurse of the Student's allergist, the resources of the Food Allergy and Anaphylaxis Network (FAAN), the Principal, and the District's 504 coordinator. However, the District did not make a record of any of the information gathered, nor did they discuss with the parents at the 504 meeting the reasons behind denying the parent's request for a peanut-free school. The parents were also not provided the appropriate notice of procedural safeguards, including "notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure." *Id.* The parents must be able to challenge the Plan and must be given, by the District, the information on how to challenge the Plan with which they disagree.

e. **Possible Modifications and Accommodations**

Modifications and accommodations provided in some districts (which were acceptable to OCR or which were provided as a part of a Resolution Agreement) include, as examples: an "allergen-free" or "food-free" classroom; cleaning areas potentially contaminated with allergen in a special way (e.g. mopping with water that is not used to mop other classrooms); appropriate training (see above); sending a letter to parents of other students in the class explaining that there is a student in the class with a food allergy, and asking parents not to send foods containing the allergen; not using food as a reward in the class; alternate treats; offering educational seminars regarding food allergies to the class or to the school's parents; providing an aide to monitor the student at school and on the bus trained to administer epinephrine, if needed; allowing the student to keep a cell phone with them; allowing the student to keep epinephrine

with him; an allergen-safe area in the cafeteria, which is cleaned using special procedures; allowing the student to sit separately in the lunchroom with a friend whose parents have agreed to avoid the student's allergen; the use of wipes to clean an area before the student uses/sits in it in the classroom, cafeteria, bus, and on field trips; an adult-to-adult transfer plan to ensure that the student's epinephrine is always close at hand, coupled with training for those adults; daily vacuuming of the classroom carpet; daily washing of the desks in the classroom; daily hand washing by everyone when they enter the classroom for the first time and after snack, recess, and lunch break; newsletters at holiday times reminding other students' parents of the classroom's food policies; and notifying the student's parents before birthday parties and celebrations involving food.

f. **Homebound Services under the IDEA**

A student's eligibility for a homebound placement should be evaluated by the IEP Committee, just as any other placement decision. Hearing officers consistently have found that homebound placements based solely on parent preference are not appropriate. *See, e.g., Gwinnett County Sch. District.*, 56 IDELR 118 (SEA GA 2010) (parents' wish to administer nonprescription nutritional supplements to an 11-year-old girl with multiple, severe disabilities during the school day did not trump the student's need to interact with same-age peers); *Cheyenne Mountain Sch. Dist.. #12*, 110 LRP 44427 (SEA CO 2010) (parents' concerns that student might have a seizure during 2.4 mile trip to school in a small school bus did not demonstrate that homebound placement was necessary); *Poway Unified Sch. Dist.*, 53 IDELR 208 (SEA CA 2009) (a parent's preference for keeping 15-year-old with autism, intellectual disability, and "leaky gut syndrome" at home based on her unsupported belief that a school-based placement posed too much health and safety risks was contrary to the goals of the IDEA); *Gwinnett County Sch. Dist.*, 109 LRP 54695 (SEA GA 2009) (a parent's fear that three siblings with an immune disorder would become sick at school, while "perhaps understandable," did not relieve a district of its responsibility to offer FAPE in the LRE); *Metropolitan Sch. Dist of Lawrence Twp.*, 36 IDELR 282 (SEA IN 2002) (homebound placement for a student with autism was inappropriate because student had no contact with other children); *Lafayette Sch. Corp.*, 30 IDELR 736 (SEA IN 1999) (rejecting parents' preferred homebound placement as unduly restrictive when the district could provide a full-day treatment program at a hospital). Further, homebound placements are not appropriate for students with disabilities whose needs can be met in a less restrictive setting. *See, e.g., Brado v. Weast*, 53 IDELR 316 (D. Md. 2010) (holding that a district could accommodate a teenager with chronic pain in the school setting by providing frequent breaks, adjusted

workloads, alternative test scheduling, and personalized instruction); *Lourdes (OR) Pub. Charter Sch.*, 57 IDELR 53 (OCR 2011) (a charter school's difficulties in hiring a school nurse did not excuse its unilateral decision to remove a student with diabetes from his general education class and place him on homebound instruction.

Nothing in the IDEA requires a district to provide a full day of instruction to a homebound student, or to provide the same amount of special education instruction the student would have received while attending school. *Renton Sch. Dist.*, 111 LRP 72136 (SEA WA 2011); *Georgetown Indep. Sch. Dist.*, 45 IDELR 116 (SEA TX 2005); *Montrose County Sch. Dist. RE-1J,* 37 IDELR 207 (SEA CO 2002); *Greenville Indep. Sch. Dist.*, 102 LRP 12471 (SEA TX 2002); *Independent Sch. Dist. of Boise No. 1*, 35 IDELR 147 (SEA ID 2001).

In *Renton*, the hearing officer considered the issue of a significantly behaviorally challenged student. The school district and parents agreed to a plan to serve the student at a private school. The student attended the private school for a summer period following a short-term provision of homebound instruction. The plan was modified when the private school refused to enroll the child for the fall semester. The district then proposed home instruction again. They offered 60 minutes per day of home instruction with a plan to gradually increase that to 90, and then 120 minutes per day based upon the student's rate of success. The hearing officer held that the most significant factor to consider was whether the homebound time period was based upon an "individualized" determination, not a pre-set amount for *all* homebound students. The hearing officer established that there is no requirement that homebound instruction be for the full school day, nor that it provide the same number of special education minutes the student received while attending school. Significantly, the hearing officer also concluded that the district was not financially liable for costs associated with supervising the student for the full school day if his home instruction was for fewer hours than that. The hearing officer, citing *Daniel O v. Missouri State Bd. of Educ.*, 30 IDELR 588 (W.D. Mo. 1999, *affirmed*, 210 F.3d 378 (8th Cir. 2000) held that the "free" criterion in FAPE is met if the instruction and support services *provided* the student are at public expense. The hearing officer concluded that the district was not financially responsible for the fact that the student was unable to attend school, where he would be supervised for a full day. "If a special education student cannot attend school due to a physical illness or disability, the school must provide FAPE via homebound services; if FAPE is provided in less than a full school day, the district is not liable for care of the child for the remainder of the day." *Renton*, 111 LRP at 72140.

The hearing officer in *Renton* also made note of the two Texas cases cited above which warrant further discussion. In *Georgetown Independent School District*, 45 IDELR 116 (SEA TX 2005), the hearing officer considered the program offered to a high school student with aplastic anemia. The student was confined to home for all activities due to severe anemia and risk of infections. The student had no cognitive or social issues to address and was provided an IEP that involved homebound instruction in the general curriculum for at least 4 hours per week with minor modifications to address his potential weakness or lack of stamina. While the student was eventually cleared by his doctor to attend school at his regular high school, the student continued to be served in homebound instruction due to serious concerns on his mother's part regarding mold contamination at the school. He was offered 6 hours per week of instruction, 4 hours to be provided by his homebound teacher, and the remainder to be provided by a Spanish and Algebra tutor. Among other claims, the parent alleged that the offered homebound services were not individualized because he was not provided PE, not induced to join clubs nor permitted to participate in driver's education, counseling, etc. The hearing officer noted that while such services may have enriched his homebound instruction, none were required to allow the student to make progress in the general education curriculum and the failure of the district to provide them in his IEP did not deny him FAPE. The hearing officer did find it significant that the school district made on-going efforts to understand and respond to the student's medical needs to allow him to attend school, even though that proved to be impossible.

In *Greenville Independent School District*, 102 LRP 12471 (SEA TX 2002) the hearing officer held that the homebound instruction given to another high school student with multiple physical and emotional disabilities was appropriate. The student suffered severe psychiatric problems and had refused to attend school. His ARD committee developed a homebound instruction schedule consisting of 6 hours of academic instruction per week and 2 hours of math instruction. The student complained that his homebound services were inappropriate because of the amount of time required to handle work assignments outside of the limited instructional time. The hearing officer disagreed and noted that homebound instruction is a reduced version of weekly classroom instruction. The hearing officer found that where the typical ninth grader might spend 30 or more hours per week in classroom instruction, this student would have 8 hours per week of instruction and found no fault with the amount of homebound services provided.

Not all hearing officers, however, give free reign to the District's determination of the amount of homebound services to provide. The

amount of homebound instruction provided to a student with a disability must be based on the student's unique needs. *See, e.g., Torrance Unified Sch. Dist.*, 111 LRP 19380 (SEA CA 2011) (five hours of home instruction a week was not adequate for students with severe needs); *Student with a Disability, In re*, 111 LRP 5952 (SEA CT 2010) (appropriate long-term homebound program must include all the classes and services for which a student is eligible, and may not be limited by the 10 hours a week regulatory minimum for high school students); *Trico Cmty. Unit Sch. Dist.* 176, 108 LRP 42817 (SEA IL 2008) (district denied FAPE to a high school junior with post-traumatic stress disorder and depression by providing only five hours of homebound tutoring a week, as the student could not learn the "increasingly rigorous curriculum" on her own).

g. Planning for particular students

As is obvious from the variety of accommodations listed above, there is no one-size-fits-all solution. The key to determining what accommodations might be appropriate for any given student is consultation with the members of the student's 504 committee and the student's doctor and/or nurse. If the school has not already obtained a release from the student's parents allowing the school nurse to speak with the student's doctor and/or nurse(s), the school will want to obtain that release. The school nurse should call and speak with the student's doctor and/or nurse(s), in order to best plan for the student. The nurse needs to document her phone conversations and present this documentation at the 504 meeting when it is held.

Though not listed in OCR's requirements for documentation, a good 504 plan will also include a list of actions the parent and/or student agree to undertake. For example, if one of the student's doctor's recommendations is that the student/patient will need an alert bracelet, this is clearly a recommendation to the student and his parents, rather than an accommodation for the school to implement. The school may also want to further discuss with the doctor and or his nurse(s) any recommendation that the student not enter the cafeteria. The school should evaluate the reasons for which the student would enter the cafeteria -- for example if programs or assemblies are held in the cafeteria, in addition to lunch. The school, parents, and physician will want to evaluate together the likelihood of peanuts being present in the cafeteria at all, or if any measures can be taken to lessen the likelihood of peanut exposure, such that the student may be able to enter the cafeteria for certain purposes.

G. SELECTED RECENT CASES

i. *Collier County Sch. Dist.*, 110 LRP 7471 (SEA FL. 2009)

By showing that the administration of a particular medication did not require medical expertise, a Florida district justified its decision not to hire a full-time nurse for a child with a seizure disorder. An ALJ found no fault with a health plan that required the principal or assistant principal to administer the medication as needed. The case turned in large part on the testimony of the district's expert. Although the child's prescription called for the medication to be administered by a registered nurse, a board-certified neurologist testified that trained, non-medical personnel could administer the medication safely in premeasured doses. "The evidence shows that the [school] principal and assistant principal received adequate training from a registered nurse ... to administer [the medication] should it be required in the future ..." the ALJ wrote. Furthermore, the fact that the child took a maintenance medication to control his seizures made the possibility of a seizure in the school setting "very unlikely." The ALJ also found no need to include a service dog in the child's IEP. Noting that the dog's purpose was to comfort the child in the event of a seizure -- a service that could be performed by his one-to-one aide -- the ALJ observed that the district was entitled to use any methodology that would provide the child FAPE.

ii. *State of West Virginia v. Beane*, 52 IDELR 199 (WV. 2009)

Although a 13-year-old with medical impairments who uses a wheelchair may have benefited from an onsite nurse, a trial court could not compel the district to obtain one, the West Virginia Supreme Court of Appeals held. The trial court violated the Due Process Clause when it failed to notify the district of the abuse petition hearing in which it issued the order for the nurse. In determining that the student required a full-time nurse to respond to his frequent seizures, the trial court relied on evidence presented by a guardian ad litem and the state department of health and human resources. Upon receiving the court order, the district filed a writ of prohibition with the Supreme Court of Appeals, asking it to block its enforcement. When a court order directly impacts the financial interest of a school district or other party, the Due Process Clause of the U.S. Constitution requires that the district receive notice and an opportunity to be heard. The trial court violated the district's due process rights by not informing it of the hearing and not providing it with a chance to present its case that the child did not require a full-time nurse. While acknowledging that the primary concern of an abuse and neglect proceeding is the best interest of the child, the Supreme Court of Appeals noted that that goal does not relieve a court from complying with due process protections. Moreover, the district's presence was crucial in this case because its evidence would have shed light on the child's best interests. The dissenting judge pointed out that the majority opinion failed to address whether the circuit court had jurisdiction of the IEP issue, given the absence of prior administrative review.

iii. ***City of Chicago Pub. Sch. Dist. 299*, 52 IDELR 28 (SEA IL. 2008)**

The parent of a 16-year-old boy with cognitive and physical impairments demonstrated that the student was entitled to the continued services of a private nurse assistant during the pendency of her due process complaint. The IDEA requires that a student remain in his current educational placement during the pendency of due process proceedings, unless the parent and district agree otherwise or certain disciplinary matters are at issue. 34 CFR 300.518. A stay-put placement must produce as closely as possible the overall educational experience enjoyed by the child under his previous IEP. *John M. v. Board of Educ. of Evanston Township High Sch. Dist.* 202, 48 IDELR 177 (7th Cir. 2007). The parent argued that the education program of the student, who depended on others for all daily living skills, included the nurse assistant, paid for by her. The IEP's modifications section stated "parent provides individual nursing services." A prior settlement agreement included a similar provision. According to the parent, the assistant attended the student on the bus and throughout the day in his current school since 2003. Two days into the current school year, the bus driver refused to let the assistant on the bus. In response to the parent's stay-put request, the district asserted that the assistant was not a component of the student's education program. Thus, barring her from the bus was not a change of placement triggering the IDEA's stay-put provision. In ruling for the parent, the IHO noted that the determination of a student's pendency placement may include extrinsic facts if the IEP is vague. Here, the IEP did not indicate what services the nurse assistant provided. However, evidence confirmed that she accompanied the student for several years, and that the district permitted this. Thus, she was an integral part of his educational experience. The IHO did not accept the district's assertion that the IEP merely documented the fact that the parent provides a private nurse assistant. Moreover, the location of the provision in the modifications section did not negate the fact that the assistant was part of the student's educational experience.

iv. ***B.M. by S.M. v. Board of Educ. Of Scott County, Ky.*, 51 IDELR 5 (E.D. KY. 2008)**

Although a student with diabetes could have remained in her neighborhood school if her district hired a full-time nurse, the district had no obligation to do so. A District Court held that the district's proposal to transfer the student to another elementary school was not discriminatory. The court acknowledged that the district had a duty to reasonably accommodate students with disabilities. However, the district had no obligation to make substantial or fundamental modifications to its own programs in order to accommodate the student. Thus, the court observed, when the parent requested that the district hire a nurse to administer the student's insulin injections, it was not unreasonable for the district to offer a placement in a nearby school that already had a full-time nurse on staff. "As [the parent] has not averred that the educational program at [the other school]

is neither free nor appropriate, she cannot demonstrate that [the district] failed to accommodate [the student] or discriminated against her on the basis of disability," U.S. District Judge Joseph M. Hood wrote. Even if the proposed accommodation was unreasonable, the court explained, the parent could not show that the district acted with deliberate indifference to the student's rights -- a requirement for relief under Section 504 and Title II. The refusal to hire a nurse was based on economic concerns, and not a conscious disregard for the student's needs.

v. ***Department of Educ., State of Hawaii*, 47 IDELR 148 (SEA HI. 2007)**

The Hawaii ED had to reimburse the parent of a 5-year-old with a tracheostomy, a gastronomy tube and reactive airway disease for expenses related to the child's placement in a private school. Because the child required 24-hour nursing care and a sanitary environment to prevent infection, an ALJ concluded that the district's offer to place the child in a busy kindergarten classroom with limited adult supervision and 370 minutes a week of skilled nursing services amounted to a denial of FAPE. The ALJ observed that the child was highly susceptible to infection, and that the district kindergarten program would contain between 16 and 24 children. Not only would the teacher and the teacher's aide be unable to provide the close supervision the child required, the ALJ explained, but they would be unable to monitor the hygiene of other students who came in contact with the child. Furthermore, the ALJ pointed out that the child received 24-hour nursing care at home and would require immediate medical assistance if the tracheostomy tube became blocked or dislodged. "The evidence did not show that the kindergarten teacher, an educational assistant, paraprofessional teacher or parent volunteer would be able to assess [the child's] medical needs and minister to [the child] throughout the school day," the ALJ wrote.

vi. ***Lee County (FL) Sch. Dist.*, 47 IDELR 18 (OCR 2006)**

Although staff member comments about the seriousness of a 7-year-old's diabetes did not in themselves amount to harassment, OCR nonetheless concluded that the student's parent demonstrated the existence of a hostile environment in a Florida elementary school. OCR concluded that the comments, viewed alongside the district's failure to train personnel on diabetes or properly respond to the parent's concerns, amounted to violations of Section 504 and the ADA. OCR explained that a school nurse's purported statements that the student was attempting to get out of work and that the student needed to "hurry up" when picking sites for her insulin injections were not discriminatory. Nor did the school's principal harass the parent when he indicated that the student's existing 504 plan satisfied her needs. "However, when analyzed in the totality of the circumstances, i.e., in conjunction with the pervasive lack of training for and coordination of the medical treatment from persons this very young student depended on for her care, and the repeated failures by district and school officials to respond to concerns

communicated by the [parent], OCR concludes that a hostile environment existed," OCR wrote. OCR pointed out that the district provided no documentation that school or district personnel were coordinating and supervising the student's treatment and reporting those efforts back to the parent. Determining that a hostile environment existed, OCR concluded that the district could remedy the problems by responding to all complaints and training its personnel to be more sensitive about the student's condition.

vii. *New Britain Bd. of Educ.*, 47 IDELR 86, (SEA CT. 2006)

The parents of a 20-year-old student with multiple disabilities could not require a Connecticut district to hire a different nurse to provide services to their daughter during the school day. Because the nurse assigned to the student met the certification requirements set forth in the student's IEP and obtained additional training following three incidents with the student's respiratory equipment, an IHO concluded she was adequately qualified to provide the services the student needed on the bus and in the classroom. The IHO recognized that the student experienced at least two potentially life-threatening incidents in which her tracheostomy tube became obstructed. However, the IHO pointed out that districts are not obligated to assign a particular individual to provide a student's services unless the student's IEP so requires. Noting that the student's IEP did not identify a specific nurse, the IHO explained that the licensed registered nurse assigned to the student's care satisfied the IEPs requirements. "[The nurse] has been certified by the [hospital in which the student resides] in all areas of nursing care required by the student," the IHO wrote. Such qualifications, the IHO observed, were all that was required under the IDEA.

viii. *San Diego Unified Sch. Dist.*, 41 IDELR 195 (SEA CA. 2006)

The IHO determined the 6-year-old student, who required frequent suctioning of his oral secretions, feeding via a gastronomy tube, administration of asthma medication by a nebulizer machine and seizure care, didn't require a 1:1 nurse. The student's unique needs could be met "by a trained and dedicated one-to-one qualified special education technician supervised by a full-time school nurse." The IHO explained the suctioning wasn't complicated, persons who were not nurses had cared for the student's health care needs at home, and the school nurse was located near the student's classroom. But the district denied the student FAPE by terminating his nursing services and by failing to include a detailed plan in his IEP to address his continuing health care needs. The IHO concluded the failure to offer any specific physical health care services to replace the 1:1 nursing services at his IEP meeting "seriously infringed on the parent's right to participate in the IEP process." The parent was not informed how the student's health concerns would be met and, as a result, was unable to seriously consider the district's offer. Additionally, the district failed to provide a transition plan outlining how those

needs would be met during the period between the offer and the completed training and certification of the special education technician staff.

ix. ***Montgomery County Intermediate Unit*, 10 ECLPR 10 (SEA PA. 2012)**

While an Intermediate Unit may have identified the services and equipment a 3-year-old with cerebral palsy would need in preschool, it denied the child FAPE by failing to timely provide them. Awarding the child substantial compensatory education, the IHO reasoned that the failure to provide feeding therapy and proper training to staff members prevented the child from taking part in classroom activities. At the child's transition meeting, the IEP team recognized the student required specialized equipment. It also identified a need for a medically-trained personal care assistant(PCA) due to the child's history of seizures, complex feeding needs, and other physical needs, including proper physical positioning. The parents filed a due process complaint, alleging that the IU largely failed to provide those things. The IHO agreed. First, when it became clear that the child's feeding goal could not be safely implemented, the IU knew or should have known that the student needed feeding therapy. The parents' witness, who provided therapy at home, convincingly detailed the complexities of the child's feeding needs and the need for ongoing training of the staff who would implement the therapy. As to the PCA, there were 24 days when the PCA was not made available. When the PCA was not present, the child did not participate in most activities and often spent most of the school day strapped to a stroller and unable to interact with peers. "Additionally, there were substantial periods ... during which Child had an assigned PCA who was not sufficiently trained to provide Child with needed physical support to engage in the [classroom] activities," the IHO wrote. Regarding specialized equipment, the IU eventually obtained a toileting chair. However, it provided only minimal training to staff, who were consequently unable to regularly use it. The IU also failed to timely provide an adaptive activities chair the student required in order to sit independently and work on many of the IEP goals.

x. ***T.B. by Brenneise v. San Diego Unified Sch. Dist.*, 58 IDELR 278 (S.D. CA. 2012)**

While a district's failure to identify a qualified individual to assist a student with G-tube feedings may have violated the IDEA, the parents could not sue for money damages under Title II or Section 504. Noting that the California district was highly responsive to the parents' accommodation requests, the District Court found no evidence of intentional discrimination. The student with autism and phenylketonuria, a metabolic disorder, required a special formula ingested through a feeding tube. The student's IEP was silent as to who would assist him with the feeding process. In practice, the district assigned the student's behavioral

support specialist to that duty. An ALJ ruled the district denied the student FAPE by failing to assign an individual with medical training, as required by state law, or a trained individual supervised by a school nurse. The parents subsequently sued for discrimination, seeking compensatory damages. The District Court, observing that this was not a case where the district ignored accommodation requests, concluded that the evidence overwhelmingly refuted the parents' claim that it intended to discriminate. "At every turn, the School District responded in good faith to [the mother's] ongoing concerns and vacillating requests," U.S. District Judge Michael M. Anello wrote. Moreover, the district did not refuse to offer a qualified individual to assist the student. It simply took an approach that differed slightly from the parents' interpretation of the statute. In addition, the district made its accommodations offer after gathering information from several qualified staff members who were managing the student's case. "The parents disagreed with the opinion, but they have no proof that the School District acted with deliberate indifference to [the student's] health and safety needs," Judge Anello wrote. Finally, the court rejected the assertion that the district singled out the student for disparate treatment based on his disability. It noted that out of 100 students in the district with G-tubes, 95 of them were also assisted by non-nurses.

xi. ***East Maine Sch. Dist. 63*, 9 ECLPR 55 (SEA IL. 2011)**

Because under state regulations, some of a student's medical needs were deemed ones only nurses could render, an Illinois district should have provided the full-time services of a professional nurse to the medically-fragile student. The 5-year-old student had medical issues that required him to be monitored for potentially fatal aspiration, dehydration, and constipation. The student had previously received full-time support from a nurse throughout his school day. However, concerns that he was becoming overly dependent on his nurse and that the nurse's presence limited teachers' direct communication with the student prompted the district to propose an IEP that limited nursing services to 120 minutes per day, which was enough time to facilitate two feedings through the student's g-tube. Since it was clear that the student needed a one-to-one person to closely monitor him, the IEP provided an aide for the rest of the school-day and for bus rides. The student's parents objected. They filed for due process arguing denial of FAPE. The state ED pointed to *Cedar Rapids Community School District v. Garret F.*, 29 IDELR 966 (U.S. 1999), in which the Supreme Court held that districts are responsible for providing nursing or health services to allow medically fragile students to attend school. Pursuant to 34 CFR 300.34(b)(13), districts must ensure that qualified persons provide nursing and health services for a student. The ED explained that according to 34 CFR 300.156(a) and 34 CFR 300.156(b), state regulations determine qualifications. In Illinois, only licensed nurses are qualified to provide nursing services, which are defined by state law. While, the ED noted that the services the student needed weren't specifically addressed by state regulations, it pointed out that the regulations prohibit a nurse from delegating activities that require the knowledge, judgment, and skill of a professional nurse.

The ED opined that the parents' expert provided credible evidence that the services the student needed required the knowledge, judgment, and skill of a nurse. Specifically, the actions necessary if the student aspirated required a professional nurse's knowledge, judgment, and skill. Since the district conceded that the student was at risk for aspiration at any time, he needed the services of a one-to-one nurse while at school and on the bus. A one-to-one aide wasn't qualified to address the student's potential needs. Therefore, the ED concluded that the district's proposed IEP was not designed to provide FAPE.

xii. *San Ramon Valley Unified Sch. Dist.*, 56 IDELR 26 (SEA CA. 2010)

The parents of a nonverbal 16-year-old boy with multiple disabilities could not recover the costs of their son's private placement simply by alleging that his proposed SDC was located too far from an accessible bathroom, lacked space for physical activity, and did not include similarly situated peers. Finding that the SDC placement would have met the student's needs, an ALJ denied the parents' request for relief. The ALJ recognized that the student was medically fragile, and that the parents had concerns about his health and safety. However, the district showed that it could educate the student without putting his health at risk. The ALJ pointed out that SDC staff could get the student to the bathroom, located in the nurse's office, in just two minutes. Although the parents expressed concerns about the student's exposure to sick children in the nurse's office, the nurse testified that the restroom would be kept clean and sanitary. With regard to the SDC's physical layout, the district indicated that it would remove clutter and unnecessary furniture to ensure that the student had a place to work on his PT and OT goals. "The room would be rearranged in order to create the required space for student's movement activities," the ALJ wrote. As for the parents' claim that the other students in the SDC were more advanced than their son, the ALJ pointed out that the student would have had several same-age peers with similar interests and communication abilities. The student would have an opportunity to socialize during weekly community outings, as well as during group activities in the classroom. Determining that the district offered the student FAPE, the ALJ denied the parents' reimbursement request.

xiii. *Montgomery County Pub. Schs.*, 109 LRP 47712 (SEA MD. 2009)

Without deciding whether a district could rely on medical information submitted by a child's parents, an ALJ found that a Maryland district's failure to arrange for medical evaluations did not amount to a denial of FAPE. The ALJ determined that the alleged violation did not result in a loss of educational opportunities. It was the parents' withdrawal from the IEP process that swayed the ALJ's decision. The ALJ observed that the IDEA's definition of "related services" includes medical services provided for diagnostic or evaluative purposes. Because the parents provided medical reports about the child's seizure disorder, it was unclear whether

the district needed to arrange for its own medical evaluations. However, the ALJ pointed out that the parents abandoned the IEP process before it was complete and enrolled the child in a private school. The ALJ explained that the parents' withdrawal made any error on the part of the district harmless. "Until the parents returned, [the district] was not obligated to investigate [the seizure disorder] and determine what impact, if any, the condition had on the student's educational functioning," the ALJ wrote. Finding no evidence of an IDEA violation, the ALJ entered a judgment in the district's favor.

xiv. *Department of Educ., State of Hawaii*, 50 IDELR 179 (SEA HI. 2008)

The parents of a first-grader with an undisclosed medical condition had little trouble convincing an ALJ that the Hawaii ED denied their child FAPE. Not only did the ED fail to provide one-to-one assistance throughout the school day, the ALJ observed, but it failed to follow the child's emergency action plan when the child suffered injuries. The ALJ noted that the child had undergone surgery that affected balance and coordination. Physical injuries would increase the risk of damage to the child's surgical implant, which in turn could have serious medical consequences. The IEP team thus determined that the child required one-to-one assistance at all times. "[The child's] safety was the educational assistant's [number one] priority," the ALJ wrote. "[The child] was required to be within arm's reach of the educational assistant at all times." Nonetheless, the child was observed unaccompanied on school grounds on several occasions during the first few weeks of school. Although the child had an emergency action plan in place to assist school staff in treating injuries, the evidence showed that staff members did not follow the plan. Moreover, neither the child's teacher nor the educational assistant attended a mandatory in-service training session about the child's medical condition. Finding that the ED denied the child FAPE, the ALJ ordered the district to hold a training session about the student's disability and look into the possibility of a private placement.

xv. *Los Angeles Unified Sch. Dist.*, 48 IDELR 118 (SEA CA. 2007)

A California district did not deny FAPE to a 9-year-old boy with a gastrostomy tube when it offered to place him in a special day class at the district's special education center. Although the child's mother objected to the district's refusal to feed the child using the "plunge method" that she used at home, an ALJ determined there was no medical reason for either homebound instruction or private placement. The ALJ observed that the prescription supplied by the child's physician only stated that the child was to be fed a mixture of pureed foods -- it did not, as the mother claimed, require the district to use the plunge method. Nor did the mother show that district's refusal to use the plunge method prevented the student from attending a public school. The ALJ pointed out that a school physician could administer feedings using the "gravity method," a technique that

complied with the district's policy on gastrostomy tube feedings and was generally considered to be safer than the plunge method. "It was not established by the evidence that [the child's] health would be placed at heightened risk by trying different methods of feeding to determine the optimal feeding method at school," the ALJ wrote. Because the district was able to accommodate the student's unique feeding needs, the ALJ concluded there was no reason to place the student in a more restrictive setting.

xvi. ***Department of Educ., State of Hawaii*, 47 IDELR 175 (SEA HI. 2006)**

The fact that a parent was qualified to serve as a kindergartner's one-to-one aide and had done so for the two previous school years did not require the Hawaii ED to rehire the parent for the upcoming school year. Because the aides hired by the ED were ready, willing and able to provide the services the child required, an IHO determined there was insufficient evidence that the ED denied the child FAPE. The IHO recognized that the parent was a licensed speech pathologist who had received training in physical therapy and one-to-one assistance. The IHO also agreed that the parent had extensive knowledge of the child's medical needs, particularly with regard to walking and posture. Nevertheless, the IHO concluded that personnel decisions were within the ED's sole discretion. "If the staff selected by the [ED] were inadequate, unqualified, or incapable of providing the services and supports required by the IEP, there could be issues as to the implementation of the IEP," the IHO wrote. "However, in the present case, the student's [aides] were found to be qualified, and were performing their duties to the best of their abilities and to the extent that they were familiar with the student's medical conditions." The IHO denied the parents' request for relief.

xvii. ***Houston (TX) Indep. Sch. Dist.*, 48 IDELR 110 (OCR 2006)**

Allegations that a Texas district routinely denied intra-district transfers to students with disabilities while granting transfers to non-disabled students were not enough to support claims that the district violated Section 504 and the ADA. Determining that the district applied its intra-district transfer policy equally to all students, regardless of their disability status, OCR found insufficient evidence of discrimination. OCR observed that the complainant, the parent of a medically fragile child with multiple disabilities, sought a transfer under the district's "space available" policy. In denying the request, OCR noted, the district indicated that the chosen school only accepted intra-district transfers if the student seeking admission qualified for the school's magnet program or required placement in the school to receive FAPE. Neither exception applied to the child in this case. Furthermore, OCR pointed out that the district had concerns that the requested transfer, which would require a longer bus ride, would jeopardize the child's safety. "[The IEP team] at [the current school] determined that the [child] would require an extended school year program and services to be provided at [the

current school], which has the closest multiply impaired program to the [child's] home school," OCR wrote. OCR also reviewed the district's records for transfer requests and found that the district approved 93 percent of the requests submitted by students with disabilities -- roughly the same percentage as those approved for non-disabled students. Finding insufficient evidence of discrimination, OCR closed the parent's complaint.

xviii. ***Georgetown Indep. Sch. Dist.*, 45 IDELR 116 (SEA TX. 2005)**

The parent of a high school student with aplastic anemia failed to show that the district denied her son FAPE by failing to provide an appropriate placement or by failing to deliver an appropriate program calculated to provide an educational benefit. Nor could she demonstrate that she was entitled to make a claim against the district for longer than one year prior to filing her request for due process. The IHO found that the one-year limitation period applied to her claims because they fell under the umbrella of the IDEA. Furthermore, the district made consistent and reasonable efforts to clean mold from the school environment and heating and cooling system and maintain good air quality, as well as to address any of the student's needs that arose from his medical condition that would allow him to return to regular school instruction. Finally, the district offered the student FAPE because it provided homebound instruction that was adequate for a student who had no cognitive or learning impairments. The student made good progress while participating in the district's program, achieving a "B" average. The IHO denied the parent's request for reimbursement for costs associated with her placement of the student in another school.

xix. ***Fayette County (KY) Schs.*, 45 IDELR 67 (OCR 2005)**

A district that informally accommodated a sixth grade student's Type I diabetes did not comply with Section 504 procedures regarding evaluation and placement and procedural safeguards, thereby denying him FAPE, OCR concluded. The student, who transferred to the Kentucky district from Pennsylvania in the middle of the school year, was not identified as a student with a disability by the district despite its knowledge of his medical condition and needs. At first, the district did not monitor the student's glucose or administer insulin and the parents complained that the student was testing his glucose in an unsanitary area, a bathroom. After the student attempted suicide by insulin overdose and spent a week in a psychiatric hospital, the district instituted informal procedures for monitoring the student's glucose and administering insulin, but failed to evaluate the student or develop a Section 504 plan, despite a parent's request and its own knowledge of his needs. The district agreed to resolve the areas of noncompliance.

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